United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by:
Eugene Welch

Docket No. 74-1081

IN THE

United States Court of Appeals

For the Second Circuit

B

UNITED STATES OF AMERICA,

Appellant,

—v—

WILLIAM JEROME HARMON,

Appellee.

On appeal from the United States District Court
Northern District of New York

BRIEF FOR APPELLANT, UNITED STATES OF AMERICA

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the trial court err in ruling Counts I, II, IV and VI defective for failure to allege an overt act beyond the alleged impersonation.

II. Did the trial court err in ruling Counts I, II, IV and VI were defective for failure to allege intent to defraud.

STATEMENT OF THE CASE

During March 1973 the defendant-appellee, William Jerome Harmon, was alleged to have pretended to be an Air Force Sergeant on leave after recently returning from a Vietnam prisoner of war camp.

As a result of his alleged activity he was indicted on seven counts. Counts I, II, IV and VI charged that he did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is, a Sergeant in the United States Air Force and falsely take upon himself to act as such in that he falsely stated to [a named person] that he was a Sergeant in the United States Air Force currently on leave, and in such pretended and assumed capacity William Jerome Harmon, at the time and place aforesaid did falsely pretend to [a named person] to be a recently returned Vietnam prisoner of war.

Each of those Counts is exactly the same with the exception that each count deals with a separate date and with a different person to whom the defendant Harmon falsely pretended to be an Air Force Sergeant.

As a result of pre-trial motions, the United States District Court for the Northern District of New York on November 12, 1973 dismissed Counts I, II, IV and VI as defective and requested the defense to prepare an appropriate order. On December 10, 1973 the United States filed a Notice of Appeal although the actual formal order was filed December 11, 1973.

In the appellant's appendix can be found the defendant's motion in the Court below, the Government's response, a copy of the Indictment, a partial transcript of the hearing in the Court below, and the formal Order of the Court below. The Court's Order left outstanding three remaining counts against the defendant Harmon for the unauthorized wearing of the official uniform of an Air Force Sergeant.

This appeal of the District Court's order dismissing four counts of the indictment is taken pursuant to Title 18, United States Code, Section 3731.

RULING BELOW

At the time of the preparation of this brief the only available transcript of the hearing below begins at the middle of the discussion between the Court and Government counsel concerning the first basis for the District Court's ruling. It is clear, however, that the District Court held as its first basis for dismissal that the Indictment was insufficient for failing to allege what it was Mr. Harmon did while acting falsely. The Court held that pretending to be on leave and pretending to be a a recently returned Vietnam prisoner of war was simply another way of stating the pretense rather than a statement of an overt act.

The second part of the Court's ruling was clearly that the indictment was defective for failure to allege intent to defraud.

POINT I

COUNTS I, II, IV and VI SUFFICIENTLY ALLEGE AN OVERT ACT BEYOND THE ALLEGED IMPERSONATION.

The District Court below held that the Counts in question were insufficient because they merely allege that the defendant falsely pretended to be an Air Force Sergeant and the further allegations about being currently on leave and a recently returned Vietnam Prisoner of War were nothing more than further allegations of this false pretense. The Court below indicated that its interpretation of the law is that the indictment must allege that the defendant did something beyond merely holding himself out as an Air Force Sergeant, apparently holding that the allegation that the defendant pretended to be a recently returned prisoner of war was nothing more than a repetition of the pretense.

In argument below the government took the position that the indictment sufficiently apprised the defendant of the charges he faced so that he could prepare a defense and protect himself from double jeopardy and that if anything further was needed it would be supplied in a bill of particulars. This argument below did not appreciate the District Court's opinion which was apparently based upon the cases cited in United States v. Harth, 280 F. Supp. 425, 427 (W.D. Okla. 1968).

Upon review of those cases and the distinction made by the District Court in Harth, however, the government submits the instant indictment is still sufficient. The instant indictment does not merely repeat the pretense of being an Air Force Sergeant but adds the overt act of pretending to be a recently released Vietnam prisoner of war. In early 1973 when the world's attention and sympathy was focused on these returning prisoners of war, that act by the alleged impersonator is considerably more significant than merely alleging he had been carrying on the usual duties of an Air Force Sergeant.

The government submits that in this instance this Court should find that this acting as a recently released Vietnam prisoner of war was "doing something which is not the pretense itself in the pretended capacity" just as the Court did in Harth, 280 F. Supp. at p. 427.

POINT II

COUNTS I, II, IV and VI ARE NOT DEFECTIVE FOR FAILURE TO ALLEGE INTENT TO DEFRAUD.

The second basis for the District Court's ruling in this case was that Court's acceptance of United States v. Randolph, 460 F. 2d 367 (5th Cir. 1972) as more persuasive than United States v. Mitman, 459 F.2d 451 (9th Cir. 1972) cert. denied 409 U.S. 863, and United States v. Guthrie, 387 F.2d 569 (4th Cir. 1967).

Therefore the Court below ruled these Counts defective for failure to allege intent to defraud.

In construing 18 U.S.C. § 912 and its predecessors, the courts generally have ascribed a twofold purpose to the statute: to protect innocent persons against fraud and to preserve the dignity and good repute of the Federal service. See United States v. Lepowitch, 318 U.S. 702, 704 (1943); United States v. Barnow, 239 U.S. 74, 80 (1915). The gist of the offense, however, is the false personation of Federal officers. See Lamar v. United States, 240 U.S. 60, 65 (1916); United States v. Barnow, 239 U.S. 74, 78 (1915). If the gist of the offense were the fraud rather than the impersonation, it might be doubted whether the act could be made an offense against the United States; since it has no relation to the execution of any of the powers of Congress or any matter within the jurisdiction of Congress. Littell v. United States, 169 F. 620, 622-23 (9th Cir. 1909). The statute is within the power of Congress to enact because a spirit of good will and respect for officers of the United States is necessary for the efficient operation of the Government and would be impaired if unauthorized and unscrupulous persons were permitted to go about the country falsely assuming for fraudulent purposes to be entitled to the respect and credit due a Federal officer. United States v. Barnow, 239 U.S. 74, 77-78 (1915). This is especially so at a time when the country is so concerned over prisoners of war.

The statute defines two separate and distinct offenses. United States v. Lepowitch, 318 U.S. 702, 704-705 (1943); United States v. Mitman, 459 F.2d, 451, 453 (9th Cir. 1972).

False personation of an officer or employee of the United States is an element of both offenses. See Lamar v. United States, 241 U.S. 103, 114-116 (1916); United States v. Barnow, 239 U.S. 74, 77 (1915), and may be effected by verbal declarations as well as by the exhibition of a counterfeited badge or a false certificate

of authority. Pierce v. United States, 86 F.2d 949, 951 (6th Cir. 1936). Government officials are impersonated by any persons who assume to act in the pretended character; United States v. Lepowitch, 318 U.S. 702, 704 (1943); and thus action alone may amount to a false pretense of Federal authority. See Heskett v. United States, 58 F.2d 897, 902 (9th Cir. 1932) (by inquiring about passports, defendants pretended to be Federal immigration officers). The most general allegation of impersonation of a Government official sufficiently charges this element of the offense; United States v. Lepowitch, 318 U.S. 702, 704 (1943).

Before the 1948 revision, the statute made an "intent to defraud" an essential element of both offenses. Honea v. United States, 344 F.2d 798, 803 (5th Cir. 1965); see United States v. Barnow, 239 U.S. 74, 75 (1915). The words are omitted from the present statute because it was thought the decision in United States v. Lepowitch, 318 U.S. 702, (1943) rendered them "meaningless". Reviser's Note, 18 U.S.C. 912 (1948). Only the first offense was directly considered in Lepowitch which held that "intent to defraud" did "not require more than the defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." The court said of the second offense, however, that "more than a mere deceitful attempt to affect the course of action of another is required" because that clause of the statute "speaks of an intent to obtain a 'valuable thing'."

It is clear that the distinctive element of the first offense is acting as the officer impersonated. See United States v. Lepowitch, 318 U.S. 702, 703 (1943); Lamar v. United States, 241 U.S. 103, 114 (1916); United States v. Barnow, 239 U.S. 74, 75 (1915). This element requires something more than a mere false pretense; there must be some overt act in keeping with

the pretense. United States v. Harth, 280 F. Supp. 425, 427 (W.D. Okla. 1968); see Lamar v. United States, 241 U.S. 103, 114 (1915); United States v. Barnow, 239 U.S. 74, 77 (1915). Acts which have been held to satisfy this requirement include attempting to elicit from one person information concerning the whereabouts of another, United States v. Lepowitch, 318 U.S. 702, 703 (1943); wearing firearms, United States v. Hamilton, 276 F.2d 96, 98 (7th Cir. 1960); attempting to stay an execution, Thomas v. United States, 213 F.2d 30, 31 (9th Cir. 1954), and making an arrest, King v. United States, 279 F. 103 (5th Cir. 1922); Reed v. United States, 252 F. 21 (2d Cir. 1918); see Roberts v. United States, 248 F. 873 (9th Cir. 1918).

The question then before this Court is in view of the elimination of the words "intent to defraud" from the statute is it still a required element of a Section 912 part [1] violation. The Government submits that it is not. Lepowitch gave meaning to those words that were in the statute at that time explaining the difference in fraudulent intent when one merely acts as an employee of the United States and when one obtains a thing of value while acting as a federal employee. When the Code was revised and the words were omitted, this Court can find that Congress intended to require a fraudulent intent only if one obtained a thing of value, a violation of the second part. This Court can find that as to the first part Congress intended that fraudulent intent was meaningless and that to protect the integrity of federal service there still exists a criminal violation for falsely acting as a federal employee regardless of whether the actor had any fraudulent intent.

When Congress revised Section 76 of Title 18 U.S.C., and enacted Section 912, the wording "[W]ith intent to defraud" was absent from the statute. The first part of Section 912 now states

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such ... . (Emphasis provided).

By the plain meaning of this branch of the statute, the merely acting as an employee of the United States constitutes an offense. This is consistent with the case history and purpose of the previous statutes in that it does not require specific intent to defraud; the object of this arm of Section 912 being to maintain the integrity of the service. This purpose is especially vital in this day when the honor of the Governmental service must be upheld wherever the occasion presents itself. The Government urges that the instant case is the precise situation in which this statute should be enforced vigorously.

The government respectfully submits that this Circuit should adopt that approach taken by the Ninth and Fourth Circuits in United States v. Mitman, 459 F.2d 451 (9th Cit. 1972) cert. denied 409 U.S. 863 and United States v. Guthrie, 387 F.2d 569 (4th Cir. 1967) and find that an indictment charging a violation of the first part of Section 912 should not be ruled defective for failure to allege meaningless words "with intent to defraud". This is especially so since Congress eliminated those words and that required intent from the statute.

CONCLUSION

The Government respectfully submits that upon a reading of the instant indictment and the statute upon which it is based, this Court should enter an order reversing the District Court for the Northern District of New York and mandating the reinstatement of Counts I, II, IV and VI of the Indictment as charged.

Respectfully submitted,

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RE: U.S.A. v. William Jerome Harmon - Docket No. 74-1081

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Everett J. Rea , being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse, New York, and is over twenty-one years of age.

That at the request of Eugene Welch, Esq., Ass't. U.S. Attorney
Attorney(m) for Appellant

(m)he personally served three (3) copies of the printed [Record] [Brief] and [Appendix] of the above-entitled case addressed to:

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